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No. 80-1121

IN THE
# Supreme Court of the United States
October Term, 1980

UNITED STATES OF AMERICA,
*Petitioner,*

v.

JOSEPH J. CLARK, ET AL.,
*Respondents.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS

## BRIEF FOR RESPONDENTS JOSEPH J. CLARK, ET AL.

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## QUESTION PRESENTED

Were respondents entitled, under the specific provisions of 5 U.S.C. 5334(b), to a two step increase in pay by reason of their respective promotions from positions in the prevailing rate Wage System (WS) to higher graded positions in the General Schedule (GS)?

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS**

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## BRIEF FOR RESPONDENTS JOSEPH J. CLARK, ET AL.

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This brief is submitted on behalf of respondents, Joseph J. Clark, et al. Respondents urge this Court to affirm the judgment of the Court of Claims.

## COUNTERSTATEMENT OF THE CASE

### A. Introduction

This case involves Federal employees of the Department of the Navy who were *promoted* from one Federal pay system to another. The two salary systems have been

generally outlined in petitioner's brief. Pursuant to merit promotion procedures, respondents, who were "prevailing-rate" Wage System employees, were promoted to positions in the General Schedule. The General Schedule is comprised of eighteen (18) grades (5 U.S.C. 5104 and 5332). Each grade is in turn divided into ten increments of pay or steps.[1] The General Schedule salaries by grade and step are consistent nationwide. There is some overlap of salaries between adjacent General Schedule grades, but the salary of the step of a higher grade is always greater than the salary of the same step of the grade immediately below (5 U.S.C. 5332).[2]

The prevailing-rate Wage System is a separate pay system from the General Schedule, and applies to those employees considered to be "prevailing-rate employees" (5 U.S.C. 5342).[3] Wage System employees include employees engaged in a recognized trade or craft. The determination of whether a position is within the General Schedule (GS) or Wage System (WS) is a classification matter. If a position clearly requires trade, craft, or laboring experience and knowledge as a requirement for the performance of its primary duty, and such requirement is

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[1]For GS grades GS-1 through GS-15, there are ten steps. There are nine steps for grade GS-16; five steps for grade GS-17; and only one step for grade GS-18.

[2]As an illustration of the overlap in salary of GS grades, using the 1974 GS salary schedule, the salary of a GS-11, Step 1 ($15,481.00) is higher than the salary of a GS-10, Step 1 ($14,117.00), but lower than the salary of a GS-10, Step 10 ($18,356.00) See Exhibit to Administrative Record, Allowed, Exhibit 9, page 14.

[3]For a review of the history of the Wage System and prevailing-rate determinations, see: *Fixing Wages and Salaries of Navy Civilian Employees in Shore Establishments, 1862-1945*, Administrative Reference Service, Report No. 9, Records Administration Division, Department of the Navy, May 1945; House Subcommittee on Manpower of the Committee on Post Office and Civil Service, 89th Congress, 2nd Session, March, 1966, report on *The Wage Board System*.

paramount, then the position is classified under the Wage System. Office of Personnel Management Manual, *Position Classification Standards, General Introduction, Background and Instruction,* (TS 47), Section IV, "Guidelines for the Determination of Trades, Crafts, or Manual Labor Positions" (January 1979). Otherwise, the position is classified in the General Schedule.

The Wage System is divided into fifteen (15) grades for non-supervisory employees and seventeen (17) grades for supervisory employees, with each grade consisting of five steps (5 U.S.C. 5343). The grade of a WS position is determined by comparison of the duties of the position with appropriate job grading standards, with consideration to the factors of skill and knowledge, responsibility, physical effort, and working conditions. *Federal Personnel Manual* (FPM), Chapter 532, Subchapter 6.[4]

Unlike the General Schedule, the rates of pay under the Wage System are not uniform nationwide. Rates of pay under the Wage System are based on a wage survey of prevailing rates for comparable work in the applicable local wage area. See: 5 U.S.C. 5341, 5343; FPM Chapter 532, Subchapters 4 and 5. The five steps of the Wage System are established as a percentage of the prevailing rate. 5 U.S.C. 5343(e). (J. A. 41).

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[4]The factors for grading non-supervisory jobs in the WS are set forth above. Supervisory WS employees are graded "through consideration of the volume, kinds, and levels of work involved, and the nature of the supervision exercised." FPM, Chapter 532, Subchapter 6-5b. Respondent D'Aversa was a supervisory WS employee before promotion. All other respondents were non-supervisory WS employees.

B. The Facts

Respondents, at all times material hereto, were civilian employees in the competitive service of the United States Department of the Navy. Pursuant to the Navy's Merit Promotion Program, each respondent was *promoted* from a position in the prevailing-rate Wage System to a position in the General Schedule.[5]

Five of the six respondents received a two step increase in salary upon promotion. Respondent Libretto, who was promoted after the other five respondents, did not. Libretto protested the pay setting incident to his promotion and requested that he also be properly accorded the two step increase in salary upon promotion (J.A. 47-51). The local Civilian Personnel Office of the Navy reviewed the different pay setting methods used to calculate respondents' pay in the General Schedule, and concluded that there was no pay setting policy in the *Federal Personnel Manual* (FPM) for promotion of employees from Wage System to General Schedule positions, and in turn, requested guidance from the Navy's Office of Civilian Manpower Management (J.A. 42-43). The Office of Civilian Manpower Management advised respondents' Commanding Officer that respondents' salary, following promotion from a Wage System to a General Schedule position, was to be made in accordance with the "highest previous rate

[5]For the Merit Promotion Program Vacancy Announcement, see: Exhibits to Administrative Record, Allowed, Exhibit 16, page 24 (Clark); Exhibit 23, page 39 (Libretto); Exhibit 30, page 53 (D'Aversa); Exhibit 45, page 91 (Proto); and Exhibit 50, page 97 (Scialpi and Wolfus). The Form 50, Notification of Personnel Action, are: J.A. 15 (Scialpi); J.A. 19 (Wolfus); J.A. 33 (D'Aversa); J.A. 35 (Libretto); and J.A. 37 (Clark). By virtue of his having previously held the GS position to which he was re-promoted, Proto was excepted from merit promotion procedures (J.A. 23).

rule", pursuant to FPM Supplement 990-2, Book 531, S2-4a(2) (J.A. 44-45).[6]

Accordingly, the Navy reduced the salary of five of the respondents to a GS salary based on the highest previous rate formula (J.A. 54-55). All six respondents submitted a grievance of the pay setting determination. This was rejected for the stated reason that the grievance involved matters of pay outside the jurisdiction of the local authority (J.A. 60-64). On January 29, 1976, respondents filed suit in the United States Court of Claims pursuant to the Tucker Act (28 U.S.C. 1491) and the Back Pay Act of 1966 (5 U.S.C. 5596). Respondents' Petition before the Court of Claims maintained that 5 U.S.C. 5334(b) entitled them to a two step increase upon *promotion* (J.A. 5-11).

On Cross-Motions for Summary Judgment, the Court of Claims held that 5 U.S.C. 5334(b) is applicable to promotions from a Wage System position to a General Schedule position (Pet. App. 1a-8a).

The Court of Claims held that since respondents had been promoted, they were entitled to pay setting which effected a two step increase in salary. The Court of Claims found that Congress, in enacting the predecessor to 5 U.S.C. 5334(b) (Section 802 of the Classification Act of 1949), intended that an increase in pay should concurrent-

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[6]The highest previous rate pay setting formula consists of a conversion of respondents' hourly salary to a per annum amount, followed by a determination of those steps within the assigned General Schedule grade the per annum salary fell. Where the per annum salary fell between two GS steps, the employee was given the higher rate of pay (J.A. 43). Pursuant to the highest previous rate formula, an employee *might not receive an increase* in pay upon promotion from the Wage System, when his hourly salary following conversion to a per annum salary is identical to a step within the GS grade to which he was promoted.

ly accompany a *promotion* in duties and responsibility (Pet. App. 7a).[7]

In response to the petitioner's allegations of administrative regularity, the Court of Claims found that regulations regarding respondents' pay setting were in and of themselves inconsistent (Pet. App. 5a), and had been applied in a confusing manner (Pet. App. A., note 7).

The case was thereafter remanded to the Trial Division of the Court of Claims for a determination of the total payment due each respondent. Petitioner submitted a Motion for Rehearing En Banc raising the same argument presented to this Court, which Motion was denied (Pet. App. 15a-16a). Thereafter, all parties stipulated to the amount of respondents' recovery and final judgment was entered on August 8, 1980 (Pet. App. 9a-14a).

C. The Statutory and Administrative Scheme

Pursuant to 5 U.S.C. 5334(b), an employee who is promoted to a position in a higher grade is entitled to a salary which exceeds his existing rate of pay by not less than a two step increase of the grade from which he is promoted (quoted in pertinent part in Pet. App. 4a).

Both petitioner and respondents agreed before the Court of Claims that the term "promotion" characterized the personnel action in issue. The Court below found that 5 CFR 531.202(h)(2) placed respondents' situation within the definition of promotion (Pet. App. A., note 5).

[7]Contrary to petitioner's characterizations otherwise, respondents were "promoted". At no time before the Court of Claims did petitioner contest the fact that respondents had been "promoted", and indeed characterized the personnel actions as promotions in its brief to the Court of Claims. (Pet. App. A., note 5).

The plain language of 5 U.S.C. 5334(b) provides that the two step increase applies to promotions and transfers to positions in a higher grade.[8] The characterization of the nature of each personnel action as a promotion was consistent with Federal Personnel Manual Supplement 296-33, Subchapter 14, *Guide to Processing Personnel Actions* (1981), which provides in Section 14-2(b)(2) that:

"(b) Promotion . . .

(2) When the old and the new positions are under different job classification systems and pay schedules, a promotion changes the employee to a position with a higher rate of pay."

As stated by the Court of Claims in its opinion, the concept of step increases for promotion originated as Section 802 of the Classification Act of 1949, Chapter 782, 63 Stat. 954, 969. Section 802 of the Classification Act of 1949 provided a one step increase upon promotion. A second step increase for promotion was added in 1962, by Section 604 of Public Law No. 87-793, 76 Stat. 832, 847-848.

Congress and the administrative agencies have clearly distinguished the concept of promotion from other personnel actions, such as appointment to a General Schedule position, or those actions by which an employee's position is converted from the Wage System to the General Schedule.

In those instances when an employee is hired to fill a position in the General Schedule, the Code (5 U.S.C.

[8]This personnel action is to be contrasted with "reassignment", which is the personnel change of an employee, while serving continuously within the same agency, from one position to another without promotion or demotion. 5 CFR 210.102(b)(12).

5333) provides that "new appointments shall be made at the minimum rate of the appropriate grade."[9] In a reassignment situation where an employee has moved into a position without promotion or demotion, the employee's salary is set by the highest previous rate rule. FPM Chapter 531, Subchapter 2-4.

In those instances where an employee's position is converted from the Wage System to the General Schedule, Subchapter 2 of Chapter 539 of the *Federal Personnel Manual* provides that the employee will receive, whenever possible, at least his or her former salary, and if the former salary of the employee falls between two steps of the grade in which his new position is placed, then his pay is fixed at the ***higher*** of the two rates.[10]

Congress specifically recognized this distinction between the pay setting mechanism following *promotion* to a position in the General Schedule, and the action of conversion of a position to the General Schedule without promotion, in the 1954 Amendment to the Classification Act. The Classification Act of 1949 originally established a pay schedule for the Crafts, Protective and Custodial Schedule, which was separate and distinct from the General Schedule. In the 1954 Amendment, which is Public Law 83-763, 68 Stat. 1105 (Sept. 1, 1954), Section 106, those positions in the Crafts, Protective and Custodial Schedule were included within the General Schedule. Section 106(c) of this Public Law 83-763 made it clear that:

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[9]As an illustration of this particular pay setting procedure, an employee hired as a GS-11 would begin at Step 1.

[10]In practice, the pay setting procedures used when a position *is converted* to the General Schedule is the "highest previous rate" rule now urged by petitioner for this case when respondents *were promoted.*

> "The conversion to grades of the General Schedule of positions covered by this section, and the initial adjustments in compensation as prescribed herein, *shall not be construed to be transfers or promotions* within the meaning of section 802(b) of the Classification Act of 1949, as amended, and the regulations issued thereunder." [emphasis added].

In this 1954 Amendment to the 1949 Classification Act, Congress clearly distinguished conversion of positions from separate pay systems to the General Schedule from transfers to a higher grade and promotion. The distinguishing feature of this matter is the nature of the personnel action. Congress has indicated that personnel actions of promotion and transfer to a higher grade are to be accorded higher salary setting than the process of conversion of positions from another pay system to the General Schedule and reassignment to another position, without promotion or demotion.

The statutory and administrative scheme of changes in pay rates coincident with a personnel action indicates that changes in salary are related to the characterization of the personnel action. In the instant matter, the personnel actions were characterized by the appropriate authority as *promotions.* Proper pay slotting must follow such promotions[11]

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[11]Respondents' promotions were as follows: Clark, from a WS ship surveyor (shipfitter) to a GS quality assurance specialist (process) (J.A. 37); D'Aversa, from a WS ship surveyor (pipefitter) to a GS supervisory production controller (shipbuilding) (J.A. 29, 33); Libretto, from a WS ship surveyor (machinist) to a GS engineering technician (drafting) (J.A. 35); Proto, from a WS ship surveyor (electrician) to a GS production controller (shipbuilding) (J.A. 23) and later to a GS contract negotiator (J.A 27); Scialpi, from a WS ship surveyor (shipfitter) to a GS contract negotiator (J.A. 15); and Wolfus, from a WS ship surveyor (machinist) to a GS contract negotiator (J.A. 19).

## SUMMARY OF ARGUMENT

The decision of the United States Court of Claims below is correct and should be affirmed. The Court below held that the plain meaning of 5 U.S.C. 5334(b) provides that employees who are promoted are entitled to a two step increase in salary. It is unquestioned that respondents were promoted under Merit Promotion procedures, and petitioner so stipulated below. Respondents were promoted from Wage System positions to positions in the General Schedule, with increased duties and responsibilities.

The legislative history of 5 U.S.C. 5334(b) discloses that Congress intended that an increase in salary (of first one, then later, two steps) was to accompany an increase in duty and responsibility. There is no legislative history whatsoever to indicate that Congress intended that the provisions of 5 U.S.C. 5334(b) were to be limited only to promotions within the General Schedule.

Petitioner's reliance on regulations issued by the Civil Service Commission (later the Office of Personnel Management), which limit the provisions of 5 U.S.C. 5334(b) to promotion within the General Schedule, is misplaced. Regulations limiting an increase in pay upon promotion to less than two steps are not consistent with the mandate of 5 U.S.C. 5334(b).

Respondents applied for promotion, competed with other employees for General Schedule positions and were selected for General Schedule positions of increased responsibility, pursuant to Merit Promotion Procedures.

Petitioner may not nullify the express intent of Congress, to accord a two step increase in pay to these promoted respondents, by an inconsistent agency regulation. The decision of the Court of Claims to this effect should stand.

## ARGUMENT

### TITLE 5 U.S.C. 5334(b), WHICH REQUIRES THAT AN EMPLOYEE WHO IS PROMOTED IS ENTITLED TO A SALARY INCREASE OF AT LEAST TWO STEPS, APPLIES TO PROMOTIONS FROM POSITIONS IN THE WAGE SYSTEM TO THE GENERAL SCHEDULE.

#### A. Respondents Are Entitled To Appropriate Increase In Pay Following Their Promotions.

Each of the respondents was promoted on the basis of merit. The selection of each for promotion was based upon demonstrated capability under the merit promotion process. Thereafter, proper pay setting follows. This personnel action is to be distinguished from *Testan v. United States,* 424 U.S. 392 (1976), where the employees sought a promotion via legal proceedings. Respondents here were promoted by personnel action, and this fact has been conceded by petitioner below. And so the Court of Claims found. This finding is basic to the case. It should not be set aside, unless it is clearly erroneous. *Roemer v. Board of Public Works of Maryland,* 426 U.S. 736, 758 (1976); *United States v. E.I. duPont de Nemours and Co.,* 353 U.S. 586, 598 (1957); and *United States v. Mississippi Valley Generating Co.,* 364 U.S. 520, 526 (1961).

The promotions of respondents were effected pursuant to merit promotion procedures (See note 5 herein). Respondents applied for promotional consideration under the Merit Promotion Program of the Navy. Respondents were qualified applicants who competed with other employees for promotion to GS positions. They were selected for their GS positions by the appropriate authority.

At the time of their promotions, respondents were Grade 8, Ship Surveyors, in the Wage System. Grade 8 was the highest grade attainable for Ship Surveyors. Five of the six respondents (Libretto being the exception) were at the highest step of WS Grade 8 (step 5). The salary of respondents could be increased only through an increase in the prevailing rate; promotion within the Wage System to positions in another position classification; or promotion to the General Schedule.

Even the local Civilian Personnel Officer characterized the personnel actions of respondents as a "promotion", although he later evidenced uncertainty as to the proper pay setting for each (J.A. 42-43). The personnel action was, at all times, characterized as a promotion for all six respondents, even though the pay setting procedure used to determine the resulting GS salary for respondent Libretto was different from that used to determine the GS salary of the other respondents.

Petitioner argues in its brief to this Court that the action was characterized as a promotion only because of pay setting procedures and speculates in its brief that the personnel action did not result in respondents being placed in positions of greater duties and responsibility. No issue of the comparability of duties and responsibilities of respondents' positions initially in the Wage System, and later in the General Schedule after their promotions, was raised below by petitioner. Respondents submit, however, that the nature of action, recorded on the personnel action notice for each respondent [Standard Form 50, Notification of Personnel Action, Item 12] by the Navy's Civilian Personnel Office as a "promotion", conclusively indicates a contemporaneous determination that each respondent had been moved to a position of increased duties and responsibilities in the General Schedule compared to the

former Wage System position which each had previously occupied.[12]

Petitioner has presented no evidence whatsoever to demonstrate that respondents did not assume positions of greater responsibility and more difficult duties following their "promotions". Respondents' demonstrated experience as Wage Board employees qualified them for promotion to General Schedule positions.[13]

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[12]That a contemporaneous comparison of respondents' duties and responsibilities was made at the time respondents were promoted and that each respondent's promotion was from a position in a lower grade to a position in a higher grade is demonstrated by the personnel actions directed toward respondent Proto. In 1968, respondent Proto was "promoted" from the Wage Board position of Ship Surveyor (Electrical Systems) to the General Schedule position of Production Controller (Shipbuilding) [Exhibit to Administrative Record, Allowed, Exhibit 43, page 87]. Thereafter respondent Proto was "demoted" through a *"change to lower grade"*, as a result of a reduction-in-force (RIF) from the General Schedule position of Production Controller (Shipbuilding) to his former Wage System position of Ship Surveyor (Electrical Systems) [Exhibit to Administrative Record, Allowed, Exhibit 42, page 86]. Then in 1972, Proto was temporarily "promoted" from the Wage System position of Ship Surveyor back to the General Schedule position of Production Controller [Exhibit to Administrative Record, Allowed, Exhibit 41, page 85]. About one month later, Proto was again "demoted" through a *"change to lower grade"* from the General Schedule to his original Wage System position at the expiration of his temporary promotion [Exhibit to Administrative Record, Allowed, Exhibit 40, page 84]. In 1973 (the personnel action in issue), respondent Proto was again "promoted" from the Wage System position of Ship Surveyor (Electrician) to the General Schedule position of Production Controller (Shipbuilding) [Exhibit to Administrative Record, Allowed, Exhibit 38, page 82].

[13]The qualification requirements for the General Schedule position of Quality Assurance Specialist (Clark) include a background in performing and/or supervising all types of welding [Exhibit to Administrative Record, Allowed, Exhibit 16, page 25]. The requirements for the GS position of Engineering Technician (Drafting) (Libretto) include a practical background of experience gained through experience in the field, rather than a professional engineering

It is clear, therefore, that respondents were "promoted", as that term is commonly understood to mean an increase in duty and responsibility, and as this personnel action is defined in 5 CFR 531.202(h)(2). Proper pay setting must follow.

### B. 5 U.S.C. 5334(b) Is Plain On Its Face That Respondents Are Entitled To A Two Step Increase Upon Promotion.

Pursuant to 5 U.S.C. 5334(b), respondents, upon being "promoted", are entitled to a two-step increase in salary. The meaning of a statute in the first instance is to be found in the very language of that particular statute itself. *Caminetti v. United States,* 242 U.S. 470, 485 (1917). See also: *Dameron v. Brodhead,* 345 U.S. 322, 326 (1953); *United States v. Rutherford,* 442 U.S. 544, 551-552 (1979). Where the language is sufficient in and of itself to enun-

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background [Exhibit to Administrative Record, Allowed, Exhibit 23, page 38]. The requirements for the GS position of Supervisory Production Controller (D'Aversa) include general and specialized experience in all areas of work in the field of shipbuilding [Exhibit to Administrative Record, Allowed, Exhibit 30, page 53]. The requirements for the GS position of Production Controller (Proto) include a general overall knowledge of conversion, overhaul and repair of Navy ships, and an overall knowledge of all basic trades [Exhibit to Administrative Record, Allowed, Exhibit 45, page 91]. The requirements for the GS position of Contract Negotiator (Scialpi and Wolfus) include understanding of the make-up of production costs with respect to overhead rates, labor skills, materials, machine operations, and processes required [Exhibit to Administrative Record, Allowed, Exhibit 50, page 97]. The typical duties of respondents in the Wage System position of Ship Surveyor was in connection with repair or overhaul work done by private contractors on ship structures and systems, to determine work required, estimate labor and material costs and time required, and to prepare detailed work specifications; to inspect work in process, and upon completion, to witness tests and make final acceptance or rejection decisions [Exhibit to Administrative Record, Allowed, Exhibit 18, page 27.].

ciate the purpose and policy of the legislation, this Court has consistently followed the express language of the statute. *United States v. American Trucking Associations*, 310 U.S. 534, 543 (1940). The language of the statute is to be given its usual, ordinary, and commonly understood meaning, unless a contrary intention is clearly indicated by the statute itself. *DeGanay v. Lederer*, 250 U.S. 376, 381 (1919); *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106, 115 (1939); *Ernst and Ernst v. Hochfelder*, 425 U.S. 185, 199, n. 19 (1976).

The rationale of the Court below was entirely correct. The Court of Claims reviewed 5 U.S.C. 5334(b) and found that the plain and ordinary meaning of that particular statute compelled a finding that respondents were entitled to a two step increase upon promotion from positions in the Wage System to positions in the General Schedule. There is no wording, whatsoever, in 5 U.S.C. 5334(b) which limits its application only to promotions within the General Schedule *alone*. The language of the statute providing for a two step increase in salary above *the grade from which the employee is promoted or transferred* is a mechanical calculation of salary and does not, as petitioner now suggests in its brief, limit the application of 5 U.S.C. 5334(b) to promotions solely within the General Schedule, because the term "grade" is used. The term "grade" is also used for the various classification levels in the Wage System. *FPM* Chapter 532, Subchapter 6; and 5 U.S.C. 5346(c).[14]

[14]The Standard Form 50, Notification of Personnel Action, indicates that respondents held grades in the Wage System. Scialpi was a Grade 8, Step 5 in the Wage System (J.A. 15); Wolfus was a Grade 8, Step 5 (J.A. 19); D'Aversa was a Grade 8, Step 5 (J.A. 29); Libretto was a Grade 8, Step 4 (J.A. 35); and Clark was a Grade 8, Step 5 (J.A 37).

The plain language of 5 U.S.C. 5334(b) is that an increase in pay shall be accorded employees who are promoted, and thereby increase the salary of employees who have advanced in duty and responsibility. Such an increase in pay of two steps rewards the promoted employees who have merited promotion by their capable and responsible performance of duties. Federal employees who have performed satisfactorily for a period of time from one to three years are accorded a within-grade salary increase of one step. 5 U.S.C. 5335.

As recognition for high quality performance, employees may be awarded an increase in salary of one step in advance of the scheduled within-grade step increase. 5 U.S.C. 5336. Congress recognized that an increase in salary beyond a one step increase was appropriate when an employee performed so satisfactorily that a promotion to increased duties and responsibilities was in order, when it amended Section 802(b) of the Classification Act by Public Law 87-793 to provide for two step increases upon promotion.

Respondents competed with other employees and were accepted into General Schedule positions pursuant to Merit Promotion procedures. At that time, petitioner characterized the resulting personnel actions as "promotions". Had petitioner contemporaneously reviewed the personnel actions and concluded that respondents had merely been reassigned to duties of equal responsibility, then the appropriate Notification of Personnel Action would have so indicated. Once petitioner determined that the personnel actions in issue were promotions, proper pay setting, pursuant to 5 U.S.C. 5334(b), must be effected. The plain language of 5 U.S.C. 5334(b) does not provide for exceptions or discretion on the part of the petitioner in setting pay upon promotion.

C. The Legislative History And Purpose Of Section 5334(b) Was Correctly Expressed By the Court of Claims.

As the Court of Claims indicated in its decision, the legislative purpose of the one (then later, two) step increase in salary was to provide that "a promotion in pay should concurrently accompany a promotion in duties and responsibilities" (Pet. App. 7a, quoting H.R. Rep. No. 1264, 81st Cong., 1st Session).

In the instant matter, inquiry into legislative history and purpose is unnecessary, since the meaning of Section 5334(b) is plain and unambiguous on its face. *TVA v. Hill*, 437 U.S. 153, 184, n. 29 (1978). However, respondents submit that complete examination of the legislative purpose does support the decision of the Court below.

In 1949, Congress was concerned with simplifying and modernizing the classification and salaries of Federal employees. Prior to the 1949 Amendment to the Classification Act (Public Law 81-429), a promoted employee did not receive an increase in salary if his previous salary matched the new salary of the higher grade. If the previous salary fell between two rates of the higher grade, the promoted employee received the higher rate.[15] Section 802 of the Classification Act[16] was enacted to provide an increase in salary of one step above the existing salary for employees who had been promoted. H.R. Rep. 1264, 81st Cong., 1st Sess., page 12.[17]

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[15] In practice, this procedure for pay setting is the same as "highest previous rate" rule advocated by petitioner as applicable here. Clearly, Congress intended a pay setting upon promotion to provide a resulting salary greater than the "highest previous rate".

[16] Predecessor to 5 U.S.C. 5334(b).

[17] The pertinent statement of the Congress was not fully quoted by petitioner in its brief. Congress clearly indicated that a pay increase

This legislative purpose of an increase in salary for an increase in duties and responsibilities was continued, but modified, in 1962 by Public Law 87-793, to provide a two step increase in salary.

Prior to 1968, each Federal agency had its own Wage Board System and conducted its own area wage surveys. In October, 1968, a coordinated Federal Wage System was instituted through Executive Order to establish uniform policies and procedures for conducting wage surveys and setting wage rates. In 1972, Congress passed Public Law 92-392, 86 Stat. 564, which enacted into law the established principles and policies for fixing and adjusting the pay of prevailing-rate (WS) employees throughout the Federal government. This previously had been done administratively. S. Rep. 92-791, 92nd Cong., 2nd Sess., page 2.

Unlike the 1949 and 1962 amendments to the Classification Act, the 1972 legislation established an orderly, statutory system for fixing and adjusting the rates of pay of prevailing-rate employees. The 1949 and 1962 amendments to the Classification Act addressed the issue of promotion and provided first for a one, and later, a two step increase in pay. The 1972 legislation was concerned with pay setting for personnel actions (including

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was to accompany a promotion to greater duty and responsibility. "At present, a promoted employee receives no immediate increase if he is already receiving a rate in the lower grade that also occurs in the higher grade. If he is receiving a rate in the lower grade that falls between two rates of the higher grade, he is promoted at the higher of these two rates. In too many cases, accordingly, an employee who is promoted to greater responsibilities or more difficult duties receives no immediate increase in pay. This is not in accord with the commonly accepted principle that a promotion in pay should concurrently accompany a promotion in duties and responsibilities. Subsection (b) of Section 802 corrects this situation."

promotion) within the prevailing-rate Wage System. The 1972 legislation did not, as petitioner suggests in its brief, approve the "highest previous rate" rule for pay slotting when respondents were promoted from the Wage System to the General Schedule. This 1972 legislation is not material to the issue of promotion from the Wage System to the General Schedule.

In any event, the Civil Service Commission provided, in *FPM* Supplement 532-1, Subchapter 8-3(d) (February 21, 1969 edition), that a promotion within the Wage System alone entitled the employee to only a one step increase in salary. Thus, Congress could not have [impliedly] "approved" the "highest previous rate" rule, when a completely different pay setting regulation [one step increase] was all that was in effect prior to the passage of the 1972 legislation for promotions within the Wage System. Moreover, the Civil Service Commission certainly did not then alter the provisions of *FPM* Supplement 532-1, Subchapter 8-3(d), following passage of the 1972 legislation [Public Law 92-392], to provide for an increase in pay pursuant to the highest previous rate rule for employees promoted within the Wage System.

The plain language of the 1972 legislation indicates that Congress was concerned with a matter entirely different from the promotion in issue here. Such legislation, therefore, has no significance in the interpretation of 5 U.S.C. 5334(b). *Rainwater v. United States,* 356 U.S. 590, 593 (1958); and *Penn Mutual Life Insurance Co. v. Lederer,* 252 U.S. 523, 538 (1920). Even in the 1972 legislation, Congress distinguished the "highest previous rate" rule from pay setting mechanics for promotions.[18]

[18]The House Report indicated that the highest previous rate rule was distinct from the minimum increase in pay an employee shall receive when promoted and the salary of new appointments. "The

The one, then two step increase in salary was enacted as 5 U.S.C. 5334(b) for the specific purpose of providing increased compensation to those employees who had been promoted, and who thereby assumed increased duties and responsibilities.

In the absence of an unmistakeable directive otherwise, the statutory language should not be construed to "run counter to the goals Congress clearly intended to effectuate". *NLRB v. Plasterers' Local Union,* 404 U.S. 116, 130 (1971).

Where the language of an act is clear, extraneous aids, such as committee reports and explanatory statements, cannot control the interpretation of the statute. Such aids are admissible to solve doubt, but should not be used to create it. *Railroad Commission of Wisconsin v. Chicago, Burlington, and Quincy Railroad Company,* 257 U.S. 563, 589 (1922).

In its brief, petitioner has cited certain remarks made at Congressional Committee hearings. These remarks, which were made at the hearing and were not considered essential for inclusion in the formal committee report, are accorded little weight in interpreting legislative intent. *McCaughn v. Hershey Chocolate Co.,* 283 U.S. 488, 493-494 (1931). If remarks made by individual Congressmen during debate are not reliable to support the intent of Congress in enacting legislation [*United States v. Trans-Missouri Freight Association,* 166 U.S. 290, 318 (1897)], then comments by Civil Service representative, Stahl, are also not

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Commission's regulations may cover matters such as (1) the minimum increase in pay that an employee shall receive when promoted; (2) application of the highest previous rate rule; and (3) the conditions under which appointments may be made above the minimum rate of the grade." House Report No. 92-339, 92nd Congress, 1st Session, page 14.

the appropriate means to ascertain legislative intent. This Court has not been disposed to go beyond the formal Committee reports in reviewing legislative intent and purpose. *Lapina v. Williams,* 232 U.S. 78, 90 (1914).

The more important aspect of the legislative history is found in the committee reports, which indicate that Congress was concerned that employees who were promoted should receive a two step increase in pay. There is nothing in any formal committee report limiting the two step pay setting process to only those promotions *within* the General Schedule. (See: S. Rep. No. 2120, 87th Cong., 2nd Sess. (1962), page 25; and H.R. Rep. No. 2525, 87th Cong., 2nd Sess., (1962), page 61).

D. The Administrative Construction of 5 U.S.C. 5334(b) Has Not Been Consistent.

As this Court stated, early in this century, in *Houghton v. Payne,* 194 U.S. 88, 99-100 (1904):

> "Contemporaneous construction is a rule of interpretation, but it is not an absolute one. It does not preclude an inquiry by the Courts as to the original correctness of such construction. A custom of the department, however long continued by successive officers must yield to the positive language of the statute."

Petitioner argues, in its brief, that the administrative construction favorable to its position was impliedly adopted by Congress when the Classification Act of 1949 was amended in 1962. It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law. *Girouard v. United States,* 328 U.S. 61, 69 (1946).

When a regulation conflicts with the statute, the fact of subsequent re-enactment is immaterial, for Congress could not add to or expand the statute by impliedly approving the regulation. *Biddle v. Commissioner of Internal Revenue,* 302 U.S. 573, 582 (1938); *Leary v. United States,* 395 U.S. 6, 25 (1969); and *Commissioner v. Acker,* 361 U.S. 87, 93 (1959). Nor can long standing practice and approval, if such be found, alter clear and explicit statutory provisions. *Louisville and Nashville Railroad Company v. United States,* 282 U.S. 740 (1931).[19] And certainly, courts are not bound by administrative construction of statutes. *Burnet v. Chicago Portrait Co.,* 285 U.S. 1, 16 (1932); *Estate of Sanford v. Commissioner of Internal Revenue Service,* 308 U.S. 39, 52 (1939).

A rule out of harmony with the statute is a mere nullity. *Dixon v. United States,* 381 U.S. 68, 74 (1965). Interpretative regulations do not constitute a standard for judging a factual situation which is binding on this Court. *Skidmore v. Swift & Co.,* 323 U.S. 134, 139 (1944). An administrative construction cannot narrow the meaning of a statute. *Helvering v. Powers,* 293 U.S. 214, 224 (1934). The Civil Service Commission (later the Office of Personnel Management) may not, by regulation, narrow the meaning [and application] of 5 U.S.C. 5334(b) to the General Schedule, and exclude from the operation of the pay setting process those promoted from WS grades.

When petitioner attempted to limit the application of 5 U.S.C. 5334(b) through 5 C.F.R. 531.204, the Court of Claims pointed out, in its decision below, that such at-

[19] "Whatever doubt or uncertainty attached to the application of the provisions of the Act to the transactions under review lay in the appreciation of the facts, and appropriate action thereon, and not in the interpretation of the terms of the law after the facts had been ascertained." 282 U.S. at 758.

tempted limitation is inconsistent with the statutory provisions of 5 U.S.C. 5334(b), and therefore cannot be controlling. See: *SEC v. Sloan*, 436 U.S. 103, 118-119 (1978). Those provisions of 5 CFR 531.204, which petitioner relies upon to limit 5 U.S.C. 5334(b) only to the specific personnel actions of *promotions and transfers within* the General Schedule, were issued *after* Congress approved the two step pay increase upon promotion.[20] And thus, such regulatory limitation upon which petitioner relies, could have no effect in interpreting the 1962 legislation.

In 1962, Congress Addressed the increase in pay for promotion and amended the pay increase following promotion from one to two steps by Public Law 87-793. There was no language in the amendment, and there were no statements made by Congress in enacting Public Law 87-793. There was no language in enacting Public Law 87-793, which *excluded* application of 5 U.S.C. 5334(b) to promotions from the Wage System to the General Schedule. The 1962 legislation, however, did clearly indicate the intent of Congress to provide for an increase in pay upon promotion. As indicated previously herein, the 1972 codification of the Prevailing-Rate Wage System did not address the question of promotion from WS to GS positions at all.

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[20]The language of 5 CFR 531.204 and its predecessor regulation, 5 CFR 25.104, have not been consistent over the years. 5 CFR 25.104 (Fed. Register, Vol. 15, No. 45, 1950) did not expressly limit the application of Section 802(b) of the Classification Act. 5 CFR 25.104 (1/1/61) limited the provisions of Section 802(b) to re-promotions and transfers involving a promotion between Classification Act grades. 5 CFR 531.204 (1/1/64) limited the provisions of Section 802(b) to transfers involving a promotion between Classification Act grades. The current provisions of 5 CFR 531.204, on which petitioner relies, which limits Section 802(b) to transfers and promotion within the General Schedule, were not issued until after Public Law 87-793 (1962) was enacted.

In enacting the 1949 Classification Act, Congress authorized the Civil Service Commission, pursuant to Section 802(a) [now 5 U.S.C., Section 5334(a)], to issue regulations governing the basic compensation which an employee may be paid after promotion and other personnel actions. H.R. Rep. No. 1264, 81st Cong., 1st Sess., page 12. Prior to 1949, regulations regarding administration of employee's salary had been issued by various agencies or through reference to decisions of the Comptroller General. Section 802(a) of the 1949 Classification Act was enacted to authorize the Civil Service Commission to prepare a comprehensive, unified set of rules. In 1972, Congress provided, in paragraph (5) of Section 5343(c) of Title 5, U.S. Code, that the Civil Service Commission was to issue rules regarding the administration of pay which a prevailing-rate employee would receive upon promotion. H.R. Report No. 92-339, 92nd Cong., 1st Sess., page 14.

This authority granted to the Civil Service Commission to prescribe regulations, pursuant to 5 U.S.C. 5334(a) and 5 U.S.C. 5343(c), governing the administration of pay for employees who are promoted, appears to conflict with 5 U.S.C. 5334(b), by which Congress itself mandated a two step increase upon promotion. The confusion only arises as a result of the issuance of conflicting regulations by the Civil Service Commission, and not as a result of the clear and unmistakable intent of Congress.

In enacting 5 U.S.C. 5334(a) and (b), Congress did not intend to grant the Civil Service Commission authority to issue regulations, pursuant to 5 U.S.C. 5334(a), to limit or nullify the specific provisions of 5 U.S.C. 5334(b), which provides for a two step increase upon promotion. One part of a statute should not be construed to annul or destroy what has been clearly granted by another section of the statute. *Peck v. Jenness,* 48 U.S. 612, 623 (1849).

It is the duty of this Court to give effect to all portions of a statute if that is possible. *United States v. Zacks,* 375 U.S. 59, 69 (1963). A statute should not be interpreted so as to render one part inoperative. *Colautti v. Franklin,* 439 U.S. 379, 392 (1979).

Neither should the Court interpret the provisions of 5 U.S.C. 5334(a) to render the application of 5 U.S.C. 5334(b) as a mere redundancy. *Jarecki v. G.D. Searle & Co.,* 367 U.S. 303, 307-308 (1961).

There is no doubt that Congress may authorize a Federal agency to issue regulations to effectuate the purpose of the statute, as was done here by 5 U.S.C. 5334(a) and 5 U.S.C. 5343(c). *Sunshine Anthracite Coal Co. v. Adkins,* 310 U.S. 381, 398 (1940). However, where, as here, a regulation issued by the agency is contrary to the unambiguous purpose of 5 U.S.C. 5334(b), and amounts to an attempt to legislate, such regulation cannot stand. *Helvering v. Sabine Transportation Co.,* 318 U.S. 306, 311-312 (1943).

The authority granted to the Civil Service Commission [Office of Personnel Management], pursuant to 5 U.S.C. 5334(a) and 5 U.S.C. 5343(c), is to prescribe regulations regarding administration of the pay setting procedures upon promotion, but it does not have authority to limit or negate the provisions of 5 U.S.C. 5334(b). The role of that office is merely to administer and formulate pay setting mechanics to insure uniformity among Federal agencies, after Congress has spoken.

Petitioner has cited decisions of the Comptroller General for the proposition that the highest previous rate is the pay setting mechanism to be used upon promotion of an employee from Wage System to General Schedule.

The Comptroller General has also applied the highest previous rate to instances when a position was converted from the Wage System to the General Schedule, or where the employee transferred from the Wage System to the General Schedule. 52 Comp. Gen. 671 (1973); 52 Comp. Gen. 695 (1973).

The Comptroller General's decisions do not distinguish pay setting methods followed in instances where a position is converted or transferred from Wage System to General Schedule from those cases where an employee is *promoted* from the Wage System to the General Schedule. Such rationale is clearly contrary to the plain language of 5 U.S.C. 5334(b), and the legislative intent that an employee who is promoted should receive an increase in salary.

For the Court to accept the administrative construction of a statute, when the statutory language is doubtful, the administrative construction must be consistently applied. Here, the language of the statute is not doubtful. And here, the administrative construction has certainly not been consistent. We need look no further to find such inconsistency than in the pay setting methods employed by the Navy following the promotions of these respondents.

For as the Court of Claims observed in its opinion, the Navy paid five of the respondents with a two step increase, then changed its mind, refused to pay the other, then reneged on the increase for the five, counterclaimed for a refund, and finally moved to dismiss on its own counterclaim (Pet. App. A., note 7). The administrative interpretations, in this case, have not been uniformly applied. Such interpretations, therefore, have no weight in the statutory interpretation here.

## CONCLUSION

THE JUDGMENT BELOW SHOULD BE AFFIRMED.

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